PP

v.

LETCHUMANAN SUPPIAH

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
ZULKEFLI MAKINUDIN FCJ
[CRIMINAL APPEAL NOS: 05-44-2005 (W) & 05-45-2005 (W)]
10 JULY 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Reduction of charge to one of possession under s. 12(2) - Appeal by prosecution against decision - Cross-appeal by accused - Accused's right of appeal - Prejudice to accused - Competency of accused's cross-appeal - Courts of Judicature Act 1964, ss. 87, 92*

CRIMINAL PROCEDURE: *Appeal - Right of - Reduction of charge against accused from one of drug trafficking to possession - Accused's right of appeal - Prejudice to accused - Competency of accused's cross-appeal - Courts of Judicature Act 1964, ss. 87, 92*

CRIMINAL PROCEDURE: *Appeal - Reduction of charge - Appeal against reduction of charge against accused from one of drug trafficking to possession - Cross-appeal by accused - Accused's right of appeal - Prejudice to accused - Competency of accused's cross-appeal - Courts of Judicature Act 1964, ss. 87, 92*

CRIMINAL PROCEDURE: *Charge - Reduction of - Appeal against reduction of charge against accused from one of drug trafficking to possession - Cross-appeal by accused - Accused's right of appeal - Prejudice to accused - Competency of accused's cross-appeal - Courts of Judicature Act 1964, ss. 87, 92*

The respondent/accused, originally charged with drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'), was acquitted by the High Court at the close of the prosecution's case without his defence being called. The Public Prosecutor then appealed to the Court of Appeal against the decision, and the Court of Appeal thereafter ordered the respondent to enter his defence on a reduced charge of possession of the said drugs under

A s. 12(2) of the Act. Hence, the present appeal by the Public Prosecutor against the said Court of Appeal decision and a cross-appeal by the respondent against the Court of Appeal's decision calling for his defence on the reduced charge of possession. The Public Prosecutor raised a preliminary objection against the
B respondent's cross-appeal on the ground that he had no right of appeal since the Court of Appeal's decision had not finally disposed of his rights yet. Similarly, the respondent also raised a preliminary objection against the Public Prosecutor's appeal against the Court of Appeal's decision.

C

Held (allowing the Public Prosecutor's preliminary objection and proceeding with Public Prosecutor's appeal; preliminary objection of the respondent/accused dismissed and his appeal struck out;)

D **Per Hashim Yusoff FCJ delivering the judgment of the court:**

(1) Since the original charge against the respondent was one of trafficking, the effect of the Court of Appeal's decision to call the defence on the reduced charge of possession would mean
E that the respondent had been acquitted of the original trafficking charge. If the trial were to continue on the basis of possession, then the respondent could only be required to rebut the presumption of possession. It would also mean that the prosecution could only get back the original charge of
F trafficking by appealing to the Federal Court at this stage, as it did in the instant appeal. The effect of the Court of Appeal's order was that the charge of trafficking had been finally disposed of by calling for the defence only for possession. This would be the correct time for the Public
G Prosecutor to appeal against the Court of Appeal's decision if he wanted the case to continue on the trafficking charge and not wait to file his appeal at the end of the whole trial. (para 9)

(2) The respondent was not prejudiced if this court were to allow
H the Public Prosecutor's appeal at this stage of the trial by reversing the Court of Appeal's decision and calling upon the respondent to make his defence on the original trafficking charge because he would still have the right and the chance to raise a reasonable doubt in the prosecution's case. Even if
I he were to be found guilty and then convicted on the

trafficking charge, he would still have his right to appeal to the Court of Appeal and further to the Federal Court. The respondent would still not be deprived of the right provided by the law for the two tiers of appeal. (para 11)

(3) The respondent had conceded that his appeal was not appealable because the matter had not finally disposed of his rights. His only argument was that since he could not appeal, the same should therefore apply to the prosecution. This meant that the respondent's appeal was not competent before this court at this stage. (para 12)

Per Zulkefli Makinudin FCJ (concurring):

(1) A question that needed to be answered at this stage was whether the accused could, in the course of the appeal by the Public Prosecutor before this court against the decision of the Court of Appeal in calling for the accused's defence of possession and not trafficking of the said drugs, challenge that decision through the back door by submitting in the course of his reply to the prosecution's appeal that he should have been acquitted. This question should be answered in the negative for the simple reason that what the law has precluded the accused from appealing must be given full effect. To allow otherwise would mean providing the accused with an avenue of appeal at this stage contrary to what the law has prohibited. Section 92 of the Courts of Judicature Act 1964 ('CJA') gives the Federal Court a very wide power when it hears an appeal. However, that power can only be exercised subject to s. 87 of the CJA, that is the appeal must be competent before the court. The word "any" before the word "decision" in s. 87 of the CJA must be confined to a decision which is final. Therefore, even if the record of appeal was before the court, the law precludes the court from going into the merits favouring the accused at this stage. A matter of convenience cannot override a substantive prohibition. *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* (foll).

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Responden/tertuduh, yang pada asalnya dituduh dengan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'), telah dibebaskan oleh Mahkamah Tinggi pada
B penghujung kes pendakwaan tanpa pembelaannya dipanggil. Pendakwa Raya kemudiannya merayu ke Mahkamah Rayuan terhadap keputusan itu, dan Mahkamah Rayuan seterusnya mengarahkan responden untuk masuk pembelaannya atas satu tuduhan lebih ringan milikan dadah tersebut di bawah s. 12(2)
C Akta. Oleh yang demikian, rayuan semasa oleh Pendakwa Raya terhadap keputusan Mahkamah Rayuan itu dan satu rayuan balas oleh responden terhadap keputusan Mahkamah Rayuan memanggil untuk pembelaannya atas tuduhan lebih ringan milikan. Pendakwa Raya membangkitkan suatu bantahan permulaan terhadap rayuan
D balas responden atas alasan bahawa beliau tidak mempunyai hak untuk merayu disebabkan keputusan Mahkamah Rayuan belum lagi menyelesaikan hak-hak beliau dengan muktamad lagi. Serupanya, responden juga membangkitkan suatu bantahan permulaan terhadap rayuan Pendakwa Raya menentang keputusan Mahkamah
E Rayuan.

Diputuskan (membenarkan bantahan permulaan Pendakwa Raya dan meneruskan dengan rayuan Pendakwa Raya; bantahan permulaan responden/tertuduh ditolak dan rayuan
F **beliau dibatalkan)**

Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Oleh kerana tuduhan yang asal terhadap responden merupakan tuduhan mengedar, akibat keputusan Mahkamah Rayuan untuk
G memanggil pembelaan atas tuduhan yang lebih ringan milikan bermaksud bahawa responden telah dibebaskan atas tuduhan asal mengedar. Jika perbicaraan diteruskan atas dasar milikan, responden hanya perlu mematahkan anggapan milikan. Ia juga bermaksud bahawa pendakwaan hanya boleh kembalikan
H tuduhan asal mengedar dengan merayu ke Mahkamah Persekutuan pada peringkat ini, yang dilakukan olehnya dalam rayuan semasa. Akibat perintah Mahkamah Rayuan ialah bahawa tuduhan mengedar telah diselesaikan secara muktamad dengan memanggil untuk pembelaan hanya bagi milikan. Ini
I merupakan masa yang sesuai untuk Pendakwa Raya merayu

terhadap keputusan Mahkamah Rayuan jika beliau ingin kes ini diteruskan atas tuduhan mengedar dan tidak untuk tunggu memfail rayuannya pada kesudahan seluruh perbicaraan. A

(2) Responden tidak mengalami apa-apa prejudis jika mahkamah ini membenarkan rayuan Pendakwa Raya di peringkat ini perbicaraan dengan membatalkan keputusan Mahkamah Rayuan dan memanggil responden untuk membuat pembelaannya atas tuduhan asal mengedar kerana beliau masih mempunyai hak dan peluang untuk membangkitkan keraguan munasabah dalam kes pendakwaan. Meskipun beliau didapati bersalah dan seterusnya disabit atas tuduhan mengedar, beliau masih mempunyai hak untuk merayu ke Mahkamah Rayuan dan selepas itu ke Mahkamah Persekutuan. Responden masih tidak akan dilucutkan hak yang disediakan oleh undang-undang bagi dua tingkat rayuan. B C D

(3) Responden telah mengaku bahawa rayuannya tidak boleh dirayu kerana perkara itu tidak menyelesaikan hak-haknya dengan muktamad. Hujahan tunggal beliau ialah oleh kerana beliau tidak boleh merayu, pendakwaan juga tidak boleh berbuat demikian. Ini bermaksud bahawa rayuan responden tidak kompeten di hadapan mahkamah ini pada peringkat ini. E

Oleh Zulkefli Makinudin HMP (bersetuju):

(1) Satu soalan yang perlu dijawab pada peringkat ini ialah sama ada tertuduh boleh, dalam proses rayuan oleh Pendakwa Raya di hadapan mahkamah ini terhadap keputusan Mahkamah Rayuan memanggil untuk pembelaan tertuduh atas milikan dan bukan mengedar dadah tersebut, mencabar keputusan itu melalui pintu belakang dengan menghujah dalam proses jawapannya kepada rayuan pendakwaan bahawa beliau sepatutnya dibebaskan. Soalan ini seharusnya dijawab dalam bentuk negatif disebabkan alasan mudah bahawa apa yang undang-undang menghalang tertuduh dari merayu sepatutnya diberi akibat penuh. Untuk membenarkan sebaliknya akan bermaksud menyediakan tertuduh dengan suatu jalan untuk merayu di peringkat ini yang bercanggah dengan apa yang dilarang oleh undang-undang. Seksyen 92 Akta Mahkamah Kehakiman 1964 ('AMK') memberi Mahkamah Persekutuan kuasa yang sungguh luas apabila ia membicara satu rayuan. F G H I

A Walau bagaimanapun, kuasa itu hanya boleh digunakan tertakluk kepada s. 87 AMK, iaitu rayuan itu mesti kompeten di hadapan mahkamah. Perkataan "apa-apa" sebelum perkataan "keputusan" dalam s. 87 AMK mesti dihadkan kepada satu keputusan yang muktamad. Oleh itu, walaupun rekod rayuan
B adalah di hadapan mahkamah, undang-undang menghalang mahkamah dari mengkaji merit-merit yang berpihak dengan tertuduh di peringkat ini. Kemudahan suatu perkara tidak boleh mengatasi suatu larangan substantif. *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* (diikuti).

C **Cases referred to:**
Cecil Rajah v. PP [1981] 1 MLJ 147 ***(refd)***
Koh Zhan Quan Tony v. PP & Anor Motion [2006] SGCA 17 ***(refd)***
Lee Ping Seng v. PP [1986] 2 MLJ 416 ***(refd)***
Megat Najumuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M)
D *Bhd [2002] 1 CLJ 645; [2002] CLJ JT2 FC* ***(refd)***
Saad Abas & Anor v. PP [1991] 1 MLJ 129 ***(refd)***
Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC ***(foll)***

E **Legislation referred to:**
Courts of Judicature Act 1964, ss. 3, 66, 87(1), 92
Dangerous Drugs Act 1952, ss. 12(2), 39A, 39B(1)(a)
Penal Code, ss. 34, 302, 354, 394

For the appellant - Nurulhuda Nuraini Mohd Nor DPP
F *For the respondent - Collin Sequerah (Amer Hamzah Arshad with him); M/s Zain & Co*

[Appeal from Court of Appeal, Criminal Appeal No: W-05-26-2000]

[Editor's note: For the Court of Appeal judgment, please see PP v. Letchumanan
G *Suppiah [2006] 1 CLJ 557.]*

Reported by Suresh Nathan

H **JUDGMENT**

Hashim Yusoff FCJ:

Background

I **[1]** The respondent (accused) in this appeal was originally charged for drug trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was acquitted by the High Court at the close of the prosecution case without his defence being

called. The Public Prosecutor then appealed to the Court of Appeal against the High Court decision. The Court of Appeal thereafter ordered the respondent to enter his defence on a reduced charge of possession of the said drugs under s. 12(2), punishable under s. 39A of the Act. Hence this appeal by the Public Prosecutor against the said Court of Appeal decision and a cross appeal by the respondent against the decision of the Court of Appeal in calling for his defence on the reduced charge of possession.

Preliminary Objections

[2] At the outset of the hearing of the appeal and the cross appeal before us, the learned DPP raised a preliminary objection against the cross appeal by the accused on the ground that he had no right of appeal as the decision of the Court of Appeal had not finally disposed off his rights yet. Similarly, the learned counsel for the accused also raised objection against the Public Prosecutor's appeal against the Court of Appeal's decision of acquitting the accused on the trafficking charge at the end of the prosecution case and ordering the accused to enter his defence on a charge of possession of the said drugs.

[3] Learned DPP's reply to the preliminary objection by the respondent is that the prosecution has a right of appeal against the said decision of the Court of Appeal since by calling the respondent to answer on the reduced charge of possession, it would mean that he was acquitted from the original charge of trafficking in the said drugs. In other words, it was submitted that there was already a final disposal of the matter regarding the trafficking charge.

[4] On this point, learned counsel for the respondent submitted that while conceding that the respondent's appeal was not appealable because the trial of the respondent has not been finally disposed of yet, the prosecution also should have no right to appeal at this stage of the trial otherwise it would mean that the Court of Appeal would have no power to exercise its discretion. Reference was made to art. 8 of the Federal Constitution which provides that there should be equality before the law. He submitted it to mean that if the respondent was not allowed to appeal at this stage, then the same should apply to the Public Prosecutor.

[5] The learned DPP submitted that the right of appeal to the Federal Court against the decision of the Court of Appeal is provided under s. 87(1) of the Courts of Judicature Act 1964 ('the CJA') which reads:

> Section 87(1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.

The word "decision" (in s. 87) is defined in s. 3 of the CJA as follows:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

Prior to the amendment of the word 'decision' in 1998, the word 'decision' was defined as follows:

> "decision" includes judgment, sentence or order.

[6] The purpose of the amendment as found in the explanatory statement to the amendment Bill of Act A 1031 which came into force on 31 July 1998 is to avoid any delay in the hearing of a case, because if a dissatisfied party were allowed to appeal against the court's decision regarding the admissibility of any evidence or document then the court would be forced to stay the hearing for the case pending the outcome of the appeal.

[7] In *Saad bin Abas & Anor v. PP* [1999] 1 MLJ 129 the accused were acquitted by the Magistrate's Court at the close of the prosecution case on a charge under s. 354 of the Penal Code. On appeal to the High Court, the accused were ordered to enter their defence on the said charge. The accused being dissatisfied with the High Court decision, applied for leave to appeal to the Court of Appeal. The Court of Appeal however ruled at p. 137 as follows:

> The order of the High Court in the present case for which leave to appeal is sought was that the applicants were to enter their defence. At the stage of making the order, certainly it has no finality in its intent. Only after the close of the defence as a result of that order will there be finality. Only after the close of the defence will there be a decision to 'affect the event of the appeal', meaning that the defence story will finally determine the result of the whole case which was the purpose of the appeal.

The Court of Appeal further ruled at p. 138:

> So, for the purpose of s. 50(2) (of the CJA), this Court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

[8] The Court of Appeal in *Saad bin Abas, supra*, relied on two Federal Court authorities ie, *Lee Pin Seng v. PP* [1986] 2 MLJ 416 and *Cecil Rajah v. PP* [1981] 1 MLJ 147 where in both cases, the Federal Court ruled that the court should not interfere with the decision of the learned judge who had ordered the defence to be called after he had heard the appeal against the decision of the Sessions Court which had acquitted the respective accused at the close of the prosecution case. Although both these cases went to the Federal Court by way of reference under s. 66 of the CJA, it goes to show that the order of the Court of Appeal should be upheld so that the trial could proceed smoothly.

[9] Although it is the respondent's counsel's argument that since the respondent could not appeal as the matter has not been finally disposed of yet, therefore the same should apply to the prosecution to prevent them from appealing against the order of the Court of Appeal asking the respondent to answer on the reduced charge of possession, I would agree with the learned DPP's submission that it does not necessarily mean so. The reason is that the original charge against the respondent was one of trafficking. The effect of the Court of Appeal's decision to call the defence on the reduced charge of possession would mean that the respondent had been acquitted of the original charge of trafficking. If the trial were to continue on the basis of possession, then the respondent could only be required to rebut the presumption of possession. It would also mean that the

prosecution could only get back the original charge of trafficking by appealing to the Federal Court at this stage, as it did in the instant appeal. The effect of the Court of Appeal's order is that the charge of trafficking has been finally disposed of by calling for the defence only for possession. It is my considered opinion that this would be the correct time for the Public Prosecutor to appeal against the Court of Appeal's decision if he wants the case to continue on the trafficking charge and not wait to file his appeal at the end of the whole trial.

[10] In *Koh Zhan Quan Tony v. PP & Anor Motion* [2006] SGCA 17 reported in [2006] 2 SLR 830 the Singapore Court dealt with the issue of whether a conviction of an accused on a lesser charge amounts to an acquittal of the original charge. In that case the accused were originally charge with murder under s. 302 read with s. 34 of the Penal Code but were convicted of the lesser charge of robbery with hurt under s. 394 Penal Code. The Court of Appeal said "the fact that the applicants were convicted of the lesser charge of robbery with hurt did not detract from the fact that they were acquitted of the charge of murder. At no time did the respondent apply to the court to drop the original charge of murder and substitute a lesser charge instead."

[11] It is also my considered view that the respondent is not prejudiced if this court were to allow the Public Prosecutor's appeal at this stage of the trial by reversing the Court of Appeal's decision and calling upon the respondent to make his defence on the original trafficking charge because he would still have the right and the chance to raise a reasonable doubt in the prosecution case. Even if he were to be found guilty and then convicted on the trafficking charges, the respondent would still have his right to appeal to the Court of Appeal and further to the Federal Court. The respondent would still not be deprived of the right provided by the law for the two tiers of appeal. (See: *Megat Najumuddin b. Dato' Seri (Dr.) Megat Khas v. Bank Bumiputera (M) Bhd.* [2002] 1 CLJ 645).

[12] As stated earlier in my judgment, the learned counsel for the respondent had conceded that his appeal is not appealable because the matter had not finally disposed of the rights of the respondent. His only argument was that since the respondent could not appeal, therefore the same should apply to the prosecution. This means that the respondent's appeal is not competent before us at this stage.

Conclusion

[13] For the above reasons, I would allow the Public Prosecutor's preliminary objection and dismiss the respondent's preliminary objection. It follows that the respondent's appeal is struck out and that the Public Prosecutor's appeal before us is to be proceeded with.

[14] My learned brothers Alauddin bin Dato' Mohd Sheriff, PCA and Zulkefli bin Ahmad Makinudin, FCJ have seen this judgment in draft and have expressed their concurrence.

Zulkefli Makinudin FCJ:

[15] I have read the judgment in draft of my learned brother Hashim bin Dato' Hj. Yusoff, FCJ and I agree with the decision that the preliminary objection of the Public Prosecutor be allowed and that of the preliminary objection of the accused be dismissed and his appeal be struck out. I would like to add in and state my views on a pertinent issue arising from these two preliminary objections as follows:

[16] A question that needs to be answered at this stage is whether the accused can in the course of the appeal by the Public Prosecutor before this court against the decision of the Court of Appeal in calling for his defence of possession and not trafficking of the said drugs challenge that decision through the back door by submitting in the course of his reply to the prosecution's appeal that he should have been acquitted. I would answer this question in the negative. The simple reason is that what the law has precluded the accused from appealing must be given full effect. To allow otherwise would mean providing the accused with an avenue of appeal at this stage contrary to what the law has prohibited. Section 92 of the Courts of Judicature Act 1964 ("CJA") gives the Federal Court a very wide power when it hears an appeal. However, that power can only be exercised subject to s. 87 of the CJA, that is the appeal must be competent before the court. On this point we have to relate back to the meaning of the word "decision". The word "any" before the word "decision" in s. 87 of the CJA must be confined to a decision which is final. Therefore, even if the record of appeal is before the court, the law precludes the court from going into the merits favouring the accused at this stage. A matter of convenience

A cannot override a substantive prohibition. It is to be noted that the accused is in no way deprived of the two tiers of appeal provided under the CJA as it is still open to him to appeal after the conclusion of the trial by the trial court. This stand is in line with the decision of the Federal Court in *Sia Cheng Soon & Anor.* B *v. Tengku Ismail bin Tengku Ibrahim* [2008] 5 CLJ 201 wherein Arifin Zakaria, FCJ (as he then was) in deciding whether the High Court ought to interfere by way of a revision on a decision of the lower court made pending a trial had this to say:

C > In my view, in *Tan Sri Eric Chia*'s case, even the High Court ought not to have interfered in the proceeding pending before the Sessions Court by calling for a revision. What more in the case of the Federal Court. In a matter such as this, since the decision on the admissibility of evidence was made in a pending case the proper course is to allow the case to proceed to its end and for D the issue to be canvassed during the appeal stage.
>
> To allow a revision of the decision made by the Subordinate Court in a pending matter as in *Tan Sri Eric Chia*'s case could lead to delay in the disposal of cases in the Subordinate Courts.

E **[17]** The Federal Court in *Sia Cheng Soon*'s case has made it clear that the appellate court should not interfere on a matter which has not been finally disposed off, a matter which is still pending before the trial court even if the matter has come up before the appellate court.

F

[18] My learned brothers Alauddin bin Dato' Mohd. Sheriff, PCA and Hashim bin Dato' Hj. Yusoff, FCJ, have seen this judgment in draft and have expressed their concurrence.

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I